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ATTORNEYS FOR APPELLEE:

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**IN THE
COURT OF APPEALS OF INDIANA**

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No. 84A01-0803-CR-108

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September 19, 2008

NAJAM, Judge

STATEMENT OF THE CASE

Antonio L. Vaughn appeals the sentence imposed upon the revocation of his probation. He raises two issues for review:

1. Whether the trial court abused its discretion in ordering Vaughn to serve his suspended sentence in its entirety instead of imposing a lesser sanction.
2. Whether the trial court erred when it calculated the amount of his suspended sentence to serve as a consequence of his probation violations.

We affirm in part and remand in part.

FACTS AND PROCEDURAL HISTORY

On September 20, 2006, the State charged Vaughn with two counts of Dealing in Cocaine, as Class B felonies. After Vaughn pleaded guilty under a plea agreement, the trial court sentenced him to six years on each count, to be served concurrently. The court suspended the sentences except for time served, forty-one days, and acknowledged that Vaughn had earned twenty-six days of good time credit.¹ As a result, the court placed Vaughn on formal probation for “five years[,] nine months[,] and twenty-three days[.]” Appellant’s App. at 18-19.

The State filed a petition and notice to revoke Vaughn’s probation on March 2, 2007; an amended petition and notice to revoke probation on April 20, 2007; and another amended petition and notice to revoke probation on July 19, 2007. On July 27, 2007, Vaughn was arrested pursuant to a warrant issued after the filing of the July petition and notice. On February 5, 2008, the court held an evidentiary hearing on the petitions and

¹ Vaughn had lost fifteen days of good time credit.

notices to revoke probation. At the conclusion of the evidence, the trial court found that Vaughn had violated the terms of his probation. As a result, the court sentenced him as follows:

The Court orders that the balance of the sentence heretofore imposed of five (5) years eleven (11) months be executed at the Indiana Department of Correction[.]. The Court finds that Defendant is entitled to credit for time heretofore served in the Vigo County Jail awaiting disposition of this matter and the Vigo County Sheriff's Department is directed to submit to the Court in writing the amount of days credit to which Defendant is entitled.

Appellant's App. at 25. Vaughn now appeals.

DISCUSSION AND DECISION

Issue One: Imposition of Suspended Sentence

Vaughn contends that the trial court abused its discretion when it ordered him to serve his entire suspended sentence as a consequence of his probation violations instead of imposing a lesser sanction.² Our supreme court has described the standard of review as follows:

Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled. The trial court determines the conditions of probation and may revoke probation if the conditions are violated. Once a trial court has exercised its grace by ordering probation rather than incarceration, the judge should have considerable leeway in deciding how to proceed. If this discretion were not afforded to trial courts and sentences were scrutinized too severely on appeal, trial judges might be less inclined to order probation to future defendants. Accordingly, a trial court's sentencing decisions for probation violations are reviewable using the abuse of discretion standard. An abuse of discretion occurs where the

² Vaughn states that this court "pursuant to Indiana Appellate Rule 7B [sic] has the authority to revise a sentence if the [court] concludes that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Appellant's Brief at 10-11 (citation omitted). But, when reviewing a sentence imposed upon the revocation of probation, the correct standard is an abuse of discretion. Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007).

decision is clearly against the logic and effect of the facts and circumstances.

Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007).

Here, Vaughn contends that the trial court abused its discretion by ordering him to serve his entire suspended sentence in the Indiana Department of Correction. Specifically, he argues that his three probation violations were “not of such an extreme nature such that the imposition of the maximum possible penalty would be appropriate.” Appellant’s Brief at 13. But Vaughn does not support his argument with cogent reasoning. As such, the issue is waived.

Waiver notwithstanding, in October 2006, Vaughn pleaded guilty to two counts of dealing in cocaine, as Class B felonies. The trial court ordered Vaughn to serve his suspended sentence on probation. But in 2007, the State filed petitions alleging that Vaughn had violated the terms of his probation. After a hearing, the trial court found that the State had proved, by a preponderance of the evidence, that Vaughn had violated the terms of his probation by: (1) his arrest and convictions for resisting arrest and minor consuming alcohol; (2) his failure to comply with the alcohol and drug treatment programs to which he had been assigned as a condition of his probation; and (3) his constructive possession of cocaine. In light of the number and nature of the violations, we cannot say that the trial court abused its discretion when it revoked Vaughn’s probation and ordered that he serve his suspended sentence in its entirety. See Prewitt, 878 N.E.2d at 188 (holding trial court “could certainly conclude from the fact that Prewitt was unwilling or unable to complete his remaining time at the halfway house that he is either still in need of treatment or does not appreciate the gravity of his situation”).

Issue Two: Calculation of Suspended Sentence

Vaughn contends that the trial court erred when it ordered him to serve five years and eleven months as a consequence of violating the terms of his probation because that sentence is longer than his originally suspended sentence. Indiana Code Section 35-38-2-3 governs the trial court's actions in the case of alleged violations of probation. At the time of Vaughn's probation revocation hearing, that section provided:³

If the court finds that the person has violated a condition at any time before termination of the period, and the petition to revoke is filed within the probationary period, the court may:

- (1) Continue the person on probation, with or without modifying or enlarging the conditions;
- (2) Extend the person's probationary period for not more than one (1) year beyond the original probationary period; or
- (3) Order execution of all or part of the sentence that was suspended at the time of initial sentencing.

³ Effective July 1, 2008, the legislature amended the statute to provide:

If the court finds that the person has violated a condition at any time before termination of the period, and the petition to revoke is filed within the probationary period, the court may impose one (1) or more of the following sanctions:

- (1) Continue the person on probation, with or without modifying or enlarging the conditions;;
- (2) Extend the person's probationary period for not more than one (1) year beyond the original probationary period;; ~~or~~
- (3) Order execution of all or part of the sentence that was suspended at the time of initial sentencing.

Ind. Code § 35-38-2-3(g) (2008) (additions underlined, deletions in strikeout). The changes are not relevant to the disposition of this case.

Ind. Code § 35-38-2-3(g) (2007). Thus, when the trial court revoked Vaughn's probation, section 35-38-2-3(g) authorized the court to order Vaughn to serve "all or part of the sentence that was suspended at the time of initial sentencing." See id.

Here, we must determine the amount of Vaughn's sentence that was suspended at his original sentencing. The trial court initially sentenced Vaughn to "concurrent periods of six (6) years on each count, which sentence [was] suspended with credit for 41 actual days served and 26 days good time credit The Defendant shall be placed on five years nine months and twenty-three days of formal probation. . . ." Appellant's App. at 18-19. But at the probation revocation hearing, the State offered into evidence the written terms of Vaughn's probation, which provide in part: "As part of my sentence, the Court has granted me probation for a period of 5 years and 11 months." State's Exhibit 3.

The sentencing transcript and written sentencing order conflict with the written probation terms regarding the amount of Vaughn's sentence that was suspended. If the trial court initially suspended five years, nine months, and twenty-three days, then the court erred when it ordered Vaughn to serve five years and eleven months of his previously suspended sentence. Because the record creates a question as to the amount of Vaughn's sentence that was originally suspended, we must remand to the trial court to determine that issue, with or without a hearing, and to resentence Vaughn for his probation violation if necessary in accordance with this memorandum decision.

Affirmed in part and remanded in part.

ROBB, J., and MAY, J., concur.